

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 02-09
(December 20, 2002)

**Propriety of Assigning Defendants to Supervised
Probation Provided by Spouse's Company**

Issue

May a judge place a defendant on supervised probation monitored by a private company that employs the judge's spouse as a manager?

Answer: No, except as provided in the opinion below.

Facts

The spouse of a municipal judge has been employed as a probation officer for a private company that provides supervised probation services to defendants in limited jurisdiction courts in a rural county. The spouse has recently become the manager of the company's operations in Arizona. The court does not contract with the company; rather, a defendant who is placed on supervised probation pays the company directly for the services. But for the availability of this company's services, the only sentencing options available to the court would be jail or unsupervised probation. The state and the defendant routinely stipulate to supervised probation in their negotiated plea agreements.

Discussion

This committee has previously addressed some of the ethical issues presented when a judge's relatives are employed by companies that provide services to the courts. We have concluded that a judge may not participate in guardianship proceedings where he is required to enter orders approving either the hiring of a business that provides services to the guardian's ward, or a subsequent accounting to the court, when the business is owned or managed by the judge's spouse. Op. 84-01. This opinion was based on former Canon 3C(1)(c) and (d), which required disqualification not only in proceedings in which the judge or spouse had a financial interest, but also where the spouse "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." *See now* Canon 3E(1)(c) and (d)(iii).

We have also concluded that a judicial officer may not divert defendants to a driving school in which the officer or a family member has an ownership or other business interest. Op. 90-03. Such a practice was found to violate the prohibition in former Canon 5C(1) against engaging in financial or business dealings that tended to reflect adversely on the judge's impartiality or exploited the judge's position. *See now* Canon 4A(1) and D(1).

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Finally, we have found it improper for a judge to order supervised visitation in a child custody case through an agency administered by a member of the judge's family. Op. 92-01, Issue 1. "The success of the agency and, therefore, the member's livelihood may be impacted by the use made of the agency by the court. An objective observer might conclude that referrals by the judge were improperly ordered or were ordered to generate agency business." Nor could the judge hear child custody cases in which the family member would be called to testify. Canon 3E(1)(d)(iv).

The facts here are similar to those in Opinion 92-01. Although that opinion relied on Canon 2B, these facts also implicate Canon 3E(1)(c). The spouse in this situation has a "financial interest" in the probation services company, within the meaning of the code, because he has now accepted a management position. As in Opinion 92-01, the success of his company, and therefore his livelihood, is directly affected by the number of defendants the judge places on supervised probation. Under these circumstances, the judge's impartiality could reasonably be questioned were she to order defendants before her to be placed on supervised probation.

While the committee's answer to the first issue posed in Opinion 92-01 was an unqualified "no," the opinion stated that "the judge should not sit on cases where he has the responsibility or discretion to order supervised visitation *unless the parties are aware of the relationship and consent to the judge's hearing the case.*" (Emphasis supplied.) Canon 3F expressly authorizes a judge to continue on a case when the basis for disqualification is disclosed on the record, the parties agree in writing or on the record that the judge should not be disqualified, and the judge agrees to continue.

As noted above, the state and defendants commonly stipulate in their plea agreements that the defendant may be placed on supervised probation in lieu of jail, an agreement that may often meet the objectives of both parties. The fact that they reach such an agreement, however, does not obviate the judge's independent responsibility to review the agreement and determine the propriety of supervised probation in each such case. Assuming full compliance with Canon 3F, if both parties are informed of the spouse's interest and agree that the judge should not thereby be disqualified, the judge may sit on these cases, take the plea and impose supervised probation if she is otherwise willing to do so.

If the conflict is not waived under Canon 3F, the judge would obviously have to recuse herself. The same result would follow if the parties do not agree on an appropriate disposition and the judge concludes that the most appropriate sentencing option is supervised probation. No matter which side disagrees with the option of supervised probation, the result is an impermissible appearance of impropriety if the judge were to stay on the case under such circumstances.

In addition, the opportunity for resolution as to the parties afforded by Canon 3F does not pertain to those cases involving a victim who objects to supervised probation. While a victim is not a party to criminal proceedings, and therefore Canon 3F would not apply, the Arizona Constitution accords standing to a victim to receive notice of the proceedings and an

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opportunity to be heard on such matters as sentencing. Ariz. Const. art. 2, § 2.1(3) and (4). For a judge to proceed with sentencing and to place a defendant on supervised probation under these facts over the objection of the victim would create an appearance of impropriety that cannot be overcome merely by the prior agreement of the parties.

Finally, should the judge's spouse for some reason be called as a witness in any subsequent proceedings, the matter would have to be heard by another judge. Canon 3E(1)(d)(iv). While Opinion 92-01, Issue 4 indicates that in the rare child custody case disqualification may not be required if the terms of Canon 3F are met, the court's paramount obligation to be scrupulous in ensuring that a criminal defendant is afforded due process of law precludes such an exception under these facts.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3E(1)(c) and (d), 3F, 4A(1), 4D(1) and 5C(1) (1993).

Other References

Arizona. Constitution, Article 2, § 2.1.

Arizona Judicial Ethics Advisory Committee, Opinions [84-01](#) (March 3, 1984); [90-03](#) (March 27, 1990); [92-01](#) (Jan. 24, 1992).